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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SEAN PATRICK MOONEY, Defendant and Appellant.	A127953 (Sonoma County Super. Ct. No. SCR537653)

I. INTRODUCTION

A jury convicted Sean Mooney of murder (Pen. Code, § 187, subd. (a)[1]), elder abuse (§ 368, subd. (b)(1)), and purchasing a stolen gun (§ 496, subd. (a)). The jury also found true allegations that Mooney personally used a firearm, intentionally discharged a firearm, and intentionally discharged a firearm causing death or great bodily injury. (§§ 12022.5, subd. (a); 12022.53, subd. (b), (c) & (d).) Finally, the jury found true a special circumstance allegation that the murder was committed for financial gain. (§ 190.2, subd. (a)(1).) Mooney was sentenced to a term of life in prison without the possibility of parole and a consecutive 25 year-to-life term for the gun use allegation.

On appeal, Mooney contends the judgment must be reversed because evidence of his involuntary statements was erroneously admitted at trial. Mooney also contends that the trial court failed to instruct on a lesser included offense of murder that was supported by the evidence, that there was a prejudicial error in a jury instruction pertaining to the

[1] All statutory references are to the Penal Code unless otherwise indicated.

special circumstance allegation, and that there was insufficient evidence to support his conviction for elder abuse. We reject all of these contentions and affirm the judgment.

II. STATEMENT OF FACTS

The crimes charged in this case relate to the May 20, 2008, shooting and death of Robert Deming (Deming), who was Mooney's 78-year-old maternal grandfather.[2] Mooney's primary defense at trial was that Deming was the victim of an accident.

A. *Background*

In 2008, Mooney lived in a home on Rio Bravo Drive in Chico (the Chico house) which was owned by his parents, Susan and Patrick Mooney.[3] Susan and Patrick lived with Deming at his home on Bonneau Road in Sonoma (the Sonoma house). Susan and Patrick paid the mortgage and all the bills for the Chico house. Twenty-year-old Mooney did not pay rent because, according to his parents, he was taking care of the Chico house while he was looking for a job. Mooney was not employed during 2008; he had been laid off from his job at PG&E the previous year. His parents had frequent conversations with him about getting a job or going back to school and also discussed their plans to sell or rent out the Chico house by the summer of 2008.

In February, Mooney's girlfriend Brandy Hance moved into the Chico house along with her infant son from a prior relationship. Brandy and Mooney had dated briefly in high school and when they got together again in February, the relationship quickly became serious. The couple's only sources of income were welfare payments that Brandy received and money that Mooney received from his parents. Brandy testified at trial that Patrick came to Chico and bought them groceries a few times a month and that she and Mooney both had a good relationship with Patrick.[4] However, Mooney refused

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[2] All date references in our statement of facts pertain to the 2008 calendar year unless otherwise specified.

[3] For clarity sake, we refer to some individuals, including Mooney's parents, by their first names.

[4] At trial, Patrick testified that he did not know that Brandy and Mooney were romantically involved or that Brandy was living at the Chico house in 2008. Patrick

to introduce Brandy to Susan, who did not know that she and the baby were living at the Chico house. Brandy did not answer the phone at the Chico house because Susan called Mooney several times a day and, when Susan came to Chico, Mooney put Brandy in a hotel.

Brandy and Mooney often argued about money and the fact that she was on welfare. According to Brandy, Mooney "always wanted to appear to look like we had money, even when we didn't." Appearances meant everything to Mooney, who disapproved of Brandy's family because they were "lower-class," and he wanted everyone to think that he was rich. He often told Brandy that "[i]f you didn't have money, you weren't anything." As their relationship progressed, Mooney isolated Brandy from her family and would not allow her to see her mother or her friends.

In April, Mooney and Brandy became engaged and Mooney used his tax refund to buy Brandy a ring. At Mooney's request, Brandy went off welfare, after which she no longer had money to pay for her son's needs. She wanted to work for a cleaning service owned by a family friend, but Mooney "didn't want his fiancé cleaning after other people's messes." Between February and May of 2008, Mooney had only $5.23 in his savings account and 42 cents in his checking account.

In late April, Mooney and Brandy decided to have a garage sale at the Chico house. They sold some of Brandy's items and other things that Mooney took from his parents' house. In addition, Mooney sold things that were not put out for sale, like mirrors and pictures that were hanging on the walls. He even let people dig up plants from the yard that they wanted to buy. Mooney used the money from the garage sale to fix his car and also "bought quite a few really expensive dinners." Shortly after the garage sale, Mooney told Brandy that they had to move out of the Chico house. Mooney wanted to move to Montana, but Brandy wanted to stay close to her family.

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claimed that he had only seen Brandy at the Chico house on one occasion in the fall of 2007.

On May 17, Brandy learned that she was pregnant with Mooney's child. Although scared at first, Mooney was very happy and excited about the news. After they learned about the pregnancy, the couple abandoned the idea of moving to Montana and decided to try to figure out a way to stay close to home. Mooney told Brandy he was going to Sonoma on May 20 to tell his family about the pregnancy and his engagement to Brandy, and to fix his grandfather's sprinkler system.

B. ***The Events of May 20***

1. ***Events in Chico***

On the morning of May 20, Mooney and Brandy ran errands before Mooney left for his trip to Sonoma. During that outing, Brandy purchased a box of .12 gauge shotgun shells at Long's while Mooney waited in the car with Brandy's baby. Brandy testified that she bought the bullets because Mooney asked her to and that she did not ask why Mooney wanted them. Brandy had never purchased ammunition for Mooney in the past, although she had seen a camouflage-colored gun in the trunk of his car. Mooney told Brandy that he bought the gun from a friend for about $250 or $300.

Marcelina Romo, an employee at Long's Drug Store, testified that she sold bullets to Brandy on May 20. She recalled the transaction because Brandy was the youngest female customer to whom Romo had ever sold bullets. Romo observed Brandy obtain advice about what bullets to buy from another customer at the store. When Romo rung up the transaction, Brandy did not respond to her greeting, was not personable, and did not make eye contact.

2. ***Events in Sonoma***

On the morning of May 20, Susan left the Sonoma house before 7:00 a.m. to go to her job at PG&E, and Patrick left the house at around noon to go to his job at the butcher department at Whole Foods in Santa Rosa.

Meanwhile, Deming spent part of the day helping a man named John Bambey with a sandblasting project. Bambey arrived at the Sonoma house in the early afternoon. Deming greeted him, showed him around the property and where to set up his equipment. At some point, Bambey left to get some additional equipment.

When Bambey returned to the Sonoma house at around 5:00 p.m., Mooney was there. There was a problem with the sandblaster mask, so Deming loaned Bambey tools and helped him repair it. Mooney stood by staring at Bambey, not saying a word. At trial, Bambey described Mooney as hostile and said he gave him the feeling that he was intruding on something. Later, while Bambey was sandblasting out in the field, Deming rode his bicycle out to check on the job and again offered assistance.

Susan arrived home from work at around 5:00 p.m. Deming and Mooney were doing something outside and it appeared to Susan that they were getting along fine. She made dinner for them and then left the house at around 6:00 p.m. to go to her regular Tuesday night dance class in another county. Patrick was working his regular shift at Whole Foods Market and would not be home until late. Bambey left the Sonoma house at 8:45 p.m.

At around 9:20 p.m., Mooney called 911 and reported that two unknown men had come onto his grandfather's property, that he heard one gunshot, and then saw the men flee. When deputy sheriffs arrived at Deming's home approximately five minutes later, Mooney was outside waiting. He was excited and nervous and was wearing only a pair of shorts. He said that he had been in a camper parked outside the house when he saw a dark colored Buick or Oldsmobile pull into the driveway. Two men got out of the car and ran in the back door of the house, then Mooney heard a single shot and saw the men run back to the car and drive away, heading towards Highway 116. Mooney described the men as white or Hispanic and said that one of them was carrying a rifle.

It was a very cold and windy night and Mooney, wearing only shorts, accepted the officer's offer to wait in the back of the patrol car. Mooney called Susan and Patrick and told each of them that someone broke into the house, that the police were there, and that he thought Deming had been shot. Meanwhile, the deputies entered the home and found

Deming dead in a rocking chair in front of the television in the living room.[5] He had been shot in the head, his hands were rested in his lap and his brain was on the floor.

At approximately 10:20 p.m., the lead investigator, Detective Christopher Vivian, arrived at the Sonoma house. Vivian secured the scene, called for additional resources and initiated efforts to pursue suspect leads. He also noticed that there was a gas station at the bottom of the only road leading to Deming's property and arranged for videos from that gas station to be obtained. Vivian had three interactions with Mooney at the crime scene. Mooney was extremely cooperative and wanted to tell Vivian what happened. He was very matter of fact, did not appear to be upset at all and never inquired about his grandfather.

At around 11:15, Vivian arranged for Mooney to be transported to the police station in Santa Rosa, which was approximately 45 minutes away. Vivian remained at the Sonoma house so he could manage the investigation. He walked the crime scene with a CSI detective, making note of important details including that there were no signs of a forced entry or a struggle, the door to the house had been closed when officers first arrived at the scene, and the house had not been ransacked. In addition, it appeared that Deming had been executed; he was sitting in his chair with his arms at rest and his entire brain had been blown out of his head. Outside the house, Vivian also noticed a camper and looked inside. There was some clothing and a bed that appeared to be undisturbed. There were no blankets, sheets or pillows on the bed, but only a canvas cover, and there were paper towels on the end of the bed. It appeared as though the camper was being cleaned out or being prepared to be sold. Once Vivian completed his initial investigation and "cleared the scene," he went to the police station to interview Mooney.

[5] The room was later described by an officer as a "make-shift bedroom, slash, living room area." The room contained a queen sized bed that was partitioned off from the living area by a "strange kind of wall." The distance from the back of Deming's chair to the edge of the bed was measured at one foot, 10 inches.

C. *Mooney's Incriminating Statements to Police*

On May 21, at approximately 4:25 a.m., Vivian began to interview Mooney at the police station. Evidence of the substance of that conversation was not admitted at trial. However, the jury was told that, after approximately five hours of questioning, Mooney agreed to return to the Sonoma house and show Vivian what really happened. At trial, Vivian confirmed that "[t]his walk-thru was kind of a culmination of a long, long discussion" that he had with Mooney. A videotape of the walk-through, which commenced at 10:15 a.m., was introduced into evidence and played for the jury at trial, while they followed along with a transcript.

At the beginning of the walk-through, Mooney admitted that, contrary to his prior statements to the 911 operator and the police, he did not go out to lie down in the camper the previous night and nobody else was at the Sonoma house when Deming was shot. Inside Deming's house, Mooney pointed out a blue sofa that he said he was lying on while he watched a movie with Deming. Mooney said he was tired and was dozing when Deming got up and went to his room. Mooney then confirmed that he was participating in the walk-through of his own free well and volition before offering the following summary of what happened the night before:

"[Mooney]: Okay. Um, so I was laying on the bed. He gets up, he went into, I think his bedroom, my eyes were closed the whole time he was gone. Um, he comes back out and he sits back down in his chair and he calls me over. And, so I get up and I looked over and he's sitting in his chair and he was holding a shotgun. He had, he had called me earlier that day and said that um, we were gonna go shooting, but my mother doesn't like guns. . . . Um, so I got up and came over and I was really excited, and he looked at me and, and said, 'I love you. Um, ah, I want you to do this. There's insurance money,' and, um, closes his eyes and he put the gun, he held the gun out for me and I took it and he meant for . . . I, I mean, I, I completely believed he meant that he wanted me to shoot him so that we would get the insurance money. I freaked out. I said that I was gonna call [Susan] and I, I, I, I turned and I came through, ah, the hallway and out towards this back door."

Mooney demonstrated how he began to leave the room with the shotgun in his hands. However, Mooney explained that he stopped in the hallway when he heard Deming trying to "get up, trying to shuffle," and reaching over to a table, because he thought Deming might be reaching for another gun. Vivian asked if Mooney had ever seen Deming with a gun before and Mooney said that he had not. Mooney then demonstrated how he turned around and jumped on to a bed, that was situated behind Deming's chair, in an effort to get to the table himself. He said that his plan was to toss the gun away, across the room, but that the safety was off and "I was holding it like you would a normal gun and it just kinda rotated and fired."

Vivian asked if Deming ever stood up. Mooney said that he did not ever make it out of the chair. According to Mooney, Deming had stopped reaching across the table and had just turned and braced himself to get up right before the gun went off. Vivian asked if he was bracing himself to get shot, to which Mooney responded "absolutely not," and said that it was "an absolute accident."

Continuing with his story, Mooney explained that the gun went off and that he just collapsed onto the bed for a minute because he could not believe what had happened. He looked over at his grandfather and then just ran outside. He showed Vivian how he ran out, closing the door behind him, and tried to decide how to get rid of the gun. He pointed out the gate he ran through, and where he threw the gun on top of one of the trailers in the back of the house. He added, at this point in the narrative, that he had previously picked up the box of shells that Deming had left sitting on the linoleum floor just inside the kitchen, and that he threw those shells on top of the trailer as well.

Mooney said that he stripped off his clothes while he was standing outside the camper and then just opened the door and put the clothes inside. Vivian asked if that happened after he got rid of the shotgun. Mooney said yes and added that "I also really . . . wiped it down before I threw it up on top of there." Vivian asked why he did that and Mooney said "Movies," explaining that he was trying to remove his fingerprints. He said "I didn't know, I was trying to do whatever I could."

Mooney said that he knew he needed a "cover story," and that he "thought one up in ten seconds and called the police and told it to 'em." Mooney repeated that he never actually went into the camper to sleep that night and then identified the clothes he had been wearing when he shot Deming.

Mooney gave a very general description of the gun as big, heavy and painted camouflage, claiming that he did not know much about shotguns. Mooney said he did not think he had any blood on him and estimated that he was approximately two feet away from his grandfather's head when the gun went off. Vivian made small-talk with Mooney while an officer retrieved the gun from the top of the trailer so that Mooney could identify it. During that waiting period, Mooney confirmed again that he had been read his rights and that he understood them and that nobody was "twisting his arm." Eventually, an officer made his way to the roof of the trailer, and held up a shotgun, which Mooney identified as the shotgun that he used. He also identified the box of ammunition, stating "Winchester, right?" and then confirming "It's mine." After more small-talk, the following exchange occurred:

"[Mooney]: You really do believe this was an accident, right?

"[Vivian]: I believe what you're telling me. Okay? That's the only truth that I have at this point.

"[Mooney]: Okay.

"[Vivian]: Okay? I still gotta put pieces together. I need to talk with CSI Detective John Buergler and ascertain if there's any, what, what the facts are and we have autopsy report. . . there's a whole lot more to this equation.

"[Mooney]: Am I gonna be in custody that whole time?

"[Vivian]: What . . . what do you mean?

"[Mooney]: I mean, I, I want to talk to my mom and my dad.

"[Vivian]: Okay. You are in custody. Make no bones about that.

"[Mooney]: But, what for (unintelligible)?

"[Vivian]: Right now, you're being detained for murder.

"[Mooney]: Murder!

"[Vivian]: Well, death at the hands of another. Okay?

"[Mooney]: But an accident's manslaughter.

"[Vivian]: Accident is manslaughter. Okay? I, I'm still waiting for people to come back with information from [Brandy], from the shotgun, things of that nature. Okay? Okay? . . .

Vivian then said he needed to hear the truth about the shotgun, disclosing that he had a report that the gun was stolen in Chico. Mooney responded that he did not steal the gun, but admitted that he had bought it a couple of weeks earlier for $250 from a man in Chico who said he found it in a field. Mooney explained that he brought the gun with him to the Sonoma house, and showed it to Deming who took it from Mooney and put it in his room. "And then," Mooney said, "I guess he got the idea later."

Vivian said this new fact did not fit with Mooney's story, that all along he had maintained that Deming had the shotgun. Mooney tried to explain that he did not want to admit that he bought the gun because that would have meant "more charges." He now admitted that he had lied earlier when told Vivian that Deming had called and told Mooney to bring the ammunition to Sonoma. Brandy had bought the bullets in Chico and Mooney brought the gun and ammunition with him because he intended to go shooting by himself in the backyard. However, when he tried to sneak the gun out there, Deming was outside with "some sandblasting guy." Mooney said that when Deming confronted him he gave the gun to his grandfather. Vivian asked if there was anything else that Mooney wanted to tell him, to which Mooney responded "that's everything," and then complained "[a]nd now I get more charges."

D. *Mooney's Phone Calls With His Parents*

Within 24 hours after his arrest, Mooney made five phone calls to his parents at the Chico house, all of which were recorded. Audiotape excerpts from the five calls were admitted into evidence and played for the jury at trial.

1. *Call Number 1*

At the beginning of their first conversation, Susan asked how Mooney was doing and he responded: "I'm fine. Here's what I'm gonna do. I'm gonna tell you exactly

what happened and I'm gonna tell you exactly what I need you to do." Mooney proceeded to describe to his parents how he shot Deming by accident. While telling that story, Mooney admitted that he bought a shotgun from a kid for around $250 because he wanted a "new toy," and that it was "obviously illegal."

When Mooney was done telling his story, Susan asked Mooney how he was feeling now, to which he responded "they booked me fucking murder! They think I intended to shoot him!" Susan asked about Mooney's prior statement that intruders had shot Deming and Mooney admitted that was a lie. Susan asked about several details, trying to "picture this," but complained that her brain was "fried."

Mooney's parents asked him to explain the condition of the Chico house. Mooney admitted that he had sold several items and became frustrated when his parents asked about specific things that were missing from the house. Mooney asked if anyone was at the Chico house when they arrived and Susan said nobody was there and asked "[w]ho was supposed to be here, honey?" Mooney said Brandy was supposed to be there and told his parents "you need to find [Brandy]!"

Mooney told his parents they needed to get character letters from everyone in the family which said that Mooney would not "shoot someone in the back of the head on purpose." He explained that, if he had a stack of letters to show the DA, then "I have an excellent argument to get him to drop the murder charge and only hit me for . . . purchasing stolen goods, which is nothing."

Susan asked to discuss the forensic evidence. Mooney said that "all the forensics backed me up except for one detail and that's that there's no print from [Deming] on the gun." Susan expressed doubt that Deming was so depressed that he would do something like this but, after some discussion, she seemed to accept that Deming's new medication could have made him depressed. Susan said she was confused as to why Mooney did not just tell her what happened in the beginning, which led to an argument about whether Susan grasped the gravity of Mooney's situation.

Mooney argued with his mother about whether he had done the right thing by cooperating with the police and not asking for a lawyer. Mooney said that he had made

the right decision because the "fact that I told the police without a lawyer exactly what happened, the truth that corroborates the evidence, that is huge." He also told his parents that "I want it to be very clear that I in no way am lined up to inherit any money from him." He said that it was important to make it clear that "I have no motive." Susan responded that Mooney had done "some really poor decision making here," that he needed to get a lawyer and that they needed to go over his story again.

Susan asked why Mooney made up the story about the intruders. Mooney said that the only thing he could think was that he could not be connected to the shooting and so "I made up a story but I told the truth in the end and it, it does match up with the evidence." When Susan asked how Mooney was feeling about Deming, he said "I don't know how to feel!!!!! What d'you mean how am I feeling??? What kind've question is that right now." Susan pointed out that he had just killed his grandfather. Mooney said he was in shock, that he did not feel anything right now, and that "I'm in . . . friggin' jail." Attempting to commiserate, Susan pointed out that her emotions had also gone numb when faced with the fact that she had lost both her father and her son. Mooney responded that she had not lost a son, that she only lost one person and told his mom to "be positive about me."

Mooney told Susan that he had been dating Brandy, that she had been staying with him at the Chico house and that the police needed to interview her. Susan said she had found baby toys and Mooney admitted that Brandy had a baby who was also staying there. The two argued about whether Brandy was an appropriate girlfriend or potential future wife. Mooney said that the reason he sold things from the house was so he and Brandy could get their own place. Susan questioned the viability of that plan. Mooney said he was considering moving into Deming's camper with Brandy for a while. [6]

Mooney told his parents to find Brandy because he wanted to talk to her. Susan said they did not have time to find Brandy because they were returning to Sonoma the

[6] At trial, Susan testified that she and Deming had planned to take a trip to Oregon later that week to sell the camper. She had told Mooney about that plan and that they intended to make a stop at the Chico house on their way to Oregon.

next day, to which Mooney responded, "go get her now! Go to the police station, find out where she went! Or . . . she's probably at her mothers, which I hate to send you there." Mooney tried to give directions to the mother's house. Susan questioned whether they should be "dragging" other people into this situation. Mooney said Brandy was already involved and the police must have picked her up. He said they had to track her down and he would call back later to talk to her.

2. *Call Number 2*

When Mooney called back, Susan said they had not talked to Brandy because she had gone out to "the fair" and left the baby with her mom. Susan urged Mooney to "leave her be," and let her go on with her life. She also told him not to say anything to the police without a lawyer, that there were discrepancies in his story they needed to discuss, and that the police had told them that Mooney confessed to murder. Susan expressed anger and frustration at the police for not letting her talk with Mooney during the interrogation and for what she perceived as "dirty play."

When Susan tried to discuss the details of Mooney's story, he responded that he did not care about that and that he needed to talk to Brandy. Susan said that she was at the fair and that someone was supposed to call them the next day. After further discussion, Susan asked what she could do to "ease" Mooney's mind and he reiterated that he needed to talk to Brandy. Susan said she was trying to arrange that but urged Mooney to really think about what had happened and to acknowledge the loss of his grandfather. Mooney responded that once he was out of jail he would "think and feel all you like." He told his mom, "whatever you have to do, I need to, I need to talk to [Brandy]." Mooney insisted that his parents find Brandy after the fair, no matter how late and bring her back to the house so he could talk to her.

3. *Call Number 3*

During their third conversation, Susan tried to discuss the accident story. Mooney said he would discuss anything she wanted the next day when she visited, but that she had to find Brandy that night. Susan said that Patrick was out looking for her. After Susan asked a few more questions about Mooney's story, the two began to argue about

items that were missing from the Chico house and about Mooney's plans to move somewhere else with Brandy.

Mooney insisted that Susan bring Brandy to visit him in jail and Susan was adamant that she could not do that. Mooney became increasingly more agitated, claiming he would not "be okay" if Susan failed to bring Brandy to him. Susan responded that her father was dead, that she had things to "tend to," that her son was in prison, but that she would try to arrange a phone call with Brandy. Mooney was incredulous that Susan would argue with him and told her that Patrick could bring Brandy to Sonoma. As they continued to argue, Mooney repeatedly complained that Susan did not understand how important it was that he see Brandy, that it was "more important than anything else."

At some point during this third phone call, Patrick returned to the Chico house, having failed to locate Brandy. Mooney talked to his father, trying to make him promise that he would bring Brandy to the jail the next day. Patrick resisted but Mooney said that "I will not survive in here if I do not see her." Patrick said he would see what he could do. Then he agreed to go back to Brandy's mother's house and, if Brandy showed up, he would bring her back to the Chico house so Mooney could talk to her on the phone.

4. *Call Number 4*

When Mooney had his fourth telephone conversation with Susan, he had already spoken with Brandy, who told him that she was going to do a cleaning job the next day. Mooney had become extremely upset by that news and was adamant that Brandy not do that cleaning job. He could not figure out how to call Brandy back and so Susan agreed to call her for him. He urged Susan to convey to Brandy that she absolutely could not do the cleaning job.

5. *Call Number 5*

When Mooney called back for the fifth time, Susan had been unable to reach Brandy, who had gone out to visit a friend. Mooney was angry that Brandy did not just stay at her mother's house as she had told him she would. Susan assured Mooney she would try to get in touch with Brandy and convince her not to do the cleaning job. Mooney would not accept that offer; he wanted assurance that Susan actually stop

Brandy from doing the cleaning job, and threatened that if Susan did not stop Brandy, he would never speak to Susan again.

E. ***Autopsy Evidence***

On May 22, 2008, an autopsy of Deming's body was performed by Dr. Kelly Arthur, a forensic pathologist. Arthur reported that Deming suffered a devastating shotgun wound to the head. There was a three quarter inch in diameter, roughly round entrance wound on the left back side of Deming's head, which extended across the top of his head to the middle of his left eyebrow. There were bursting fractures and bursting lacerations of his scalp and skull. Every bone in Deming's cranium was broken, and the top of his skull was essentially "blown off." The majority of his brain had been ejected or eviscerated from his head. There was brain matter in his esophagus and trachea which indicated that "he was alive enough to take a couple of breaths or a couple of swallows to swallow the brain matter and blood into his esophagus," and to "breathe the brain matter and blood into his bronchi."

At trial, Dr. Arthur offered the expert opinion that the gun shot injury that Deming suffered was a "contact wound." Arthur explained to the jury that there are three basic types of contact wounds: hard contact, where the weapon is placed firmly against the skin; regular contact, where the weapon touches the skin, and loose contact, where there may be a millimeter or so between the weapon and skin. In this case, Arthur opined that the range of fire was anywhere between actual contact and four inches and testified that her opinion was supported by the findings in the autopsy report, including (1) the absence of unburned firearm residue or propellant in the hair; (2) the presence of soot on bone; and (3) the devastating nature of the injury to the head. Arthur explained that when a gun is placed against the head, gas goes into the head causing a bursting effect. When the gun is a foot away, it can still cause devastating injury but not to the degree observed in this case.

F. ***The Shotgun***

Todd Upton testified at trial that the shotgun that killed Deming belonged to him; it was a graduation gift from his father. In September 2007, the gun went missing from

the back of Upton's jeep while he was visiting a friend in Chico. Upton testified that he had never met Mooney and that he did not give Mooney permission to have his gun.

A forensic scientist named John Jacobson examined the shotgun and a fired shotgun shell that was recovered from the Sonoma house. Jacobson testified that the shell was fired from that gun. Jacobson also examined the autopsy evidence and performed an experiment with the gun which he used to formulate an expert opinion that the shotgun that caused Deming's injuries was fired from between two and four inches away from Deming's head.

G. *Deming's Trust*

Deming kept his assets in a trust and had appointed Susan as his trustee. At trial Susan admitted that she had discussed the terms of the trust with Mooney. Deming's assets were divided among Susan and her brother and sister. Deming had three pieces of real property, and he left his Sonoma property to Susan. That five-acre property, which included the Sonoma house, had an appraised value of between $1.1 and $1.3 million. Susan also inherited the camper that was parked on the Sonoma property and Deming's truck. In addition, Deming left approximately $21,000 in financial assets that were to be divided among his children.

III. DISCUSSION

A. *The Admission that Mooney Shot Deming*

1. *Issue Presented and Standard of Review*

As reflected in our factual summary, statements Mooney made during the May 21 interview at the police station were not admitted into evidence at trial. However, Mooney contends that Vivian made a promise of leniency during that interview which induced Mooney to admit that he accidentally shot Deming. Specifically, Mooney contends that Vivian's comments constituted an implied promise that if Mooney admitted he accidentally shot Deming, he would then only be charged with involuntary manslaughter and he would not have to go to prison for more than 13 months. Accordingly, Mooney

maintains that his admission was involuntary and should have been excluded from evidence at trial along with all of its fruit.[7]

Both the federal and state constitutions bar the prosecution from using a defendant's involuntary confession. (*People v. Holloway* (2004) 33 Cal.4th 96, 114 (*Holloway*).) "A defendant's admission or confession challenged as involuntary may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary. [Citations.] A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity. [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 659 (*Williams*).)

" 'Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outlines of theories of events, confrontation with contradictory facts, even debate between police and suspect. . . . Yet in carrying out their interrogations the police must avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession. . . . [The police] are authorized to interview suspects who have been advised of their rights, but they must conduct the interview without the undue pressure that amounts to coercion and without the dishonesty and trickery that amounts to false promise.' [Citation.]" (*Holloway, supra*, 33 Cal.4th at p. 115.)

" 'Under both state and federal law, courts apply a "totality of the circumstances" test to determine the voluntariness of a confession. . . . In determining whether a confession was voluntary, "[t]he question is whether defendant's choice to confess was not 'essentially free' because his will was overborne." ' [Citation.]" (*Holloway, supra*,

[7] Apparently, Mooney is contending that this fruit includes all evidence that can be connected to statements Mooney made after the admission that he shot Deming. At a minimum, Mooney is claiming that the May 21 walk-through of the crime and the five telephone conversations with his parents were tainted by Vivian's improper promise of leniency.

33 Cal.4th at p. 114.) "Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' [Citation.]" (*Williams, supra*, 16 Cal.4th at p. 660.)

Many cases hold or intimate that a confession induced by a promise of leniency, whether express or implied, and no matter how slight, can render a confession involuntary. (*See People v. Vasila* (1995) 38 Cal.App.4th 865, 873-874 (*Vasila*), and authority cited therein.) However, our Supreme Court has repeatedly acknowledged that, under current state and federal law, "no single factor is dispositive in determining voluntariness, but rather courts consider the totality of circumstances. [Citations.]" (*Williams, supra,* 16 Cal.4th at p. 661; see also *People v. Neal* (2003) 31 Cal.4th 63, 79 (*Neal*) ["[v]oluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.'"].) Thus, in assessing whether an improper promise of benefit or leniency has been made, we do not view that challenged statement in isolation but rather construe it in the context of the entire interview.

In the present case, when Mooney arrived at the police station, he was placed in an interview room where his conduct and statements were recorded.[8] When, as here, the allegedly involuntary statement was made during a recorded interview, "the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness." (*People v. McWorter* (2009) 47 Cal.4th 318, 348.)

2. *Background: The May 21 Interview*

As noted above, the May 21 interview was conducted over several hours. We have divided our summary of that interview into five parts so that we can address the

[8] The videotape of the May 21 interview was transferred onto four DVD's which were marked as exhibits and reviewed by the trial court. This court has reviewed those DVD's.

specific circumstances that Mooney challenges on appeal while also providing the overview necessary to consider the totality of the circumstances.

Part 1: *Background and Waiver of Rights*

Mooney was in the interview room for approximately four hours before the interview commenced. During that period, he was provided with a shirt, chips and water, and was given access to a bathroom. At times, Mooney appeared anxious and nervous, at other times he sat quietly and, for long periods, he rested his head against the wall or table and slept. Sometimes Mooney made comments out loud. Periodically, people came to check on him. Mooney expressed concern about the length of time that passed, but he did not ask to leave or to talk to a lawyer, and he appeared willing to wait and talk.

At approximately 4:25 a.m., Vivian commenced a formal interview. He began by apologizing for the delay and explaining that there is a "process to this whole thing," to which Mooney responded that he understood that from watching shows like "CSI. " In response to background questions, Mooney disclosed that he was 20 years old, he lived in the Chico house with his girlfriend Brandy, and Susan did not know about Brandy and would not approve of her. Mooney also said that he had been laid off at PG&E, he was thinking of becoming a cop, his uncle, who was "retired SWAT," taught him to shoot, and he "just recently" bought himself a .22 so he could "keep up the practice."

Vivian then explained that he was following a process so he could determine what Mooney knew and what he saw at his grandfather's house the previous night. Mooney said he was an eyewitness and acknowledged that he "absolutely" understood the process. He was advised of his *Miranda* rights, said he understood them and that he "absolutely" could tell the officer what happened. Mooney told Vivian that "I've been running over it. I've even—I even have like the times down."

Part 2: *Mooney's First Version of the Events*

Mooney gave a detailed account of his activities on May 20. He woke early to take care of Brandy's baby, he picked up items for Patrick from Mooney Farms, a family owned food processing plant that makes sun dried tomatoes, and he arrived at the Sonoma house at around 5:00 p.m., approximately five minutes before his mother got

home from work. After Susan went to her dance class, Mooney and Deming went to town to pick up a movie and some auto parts. They started watching the movie at around 8:30. Just before 9:00, Mooney took the dog and went out to a bed in the camper because he was falling asleep.

Mooney said that he was almost asleep in the camper when he heard a car. A blue car that he did not recognize drove onto the property, and two men got out and went in the back door of the house. Then Mooney heard a really loud pop, which sounded like a gun shot. The two men ran back to their car and Mooney could see the top of a long gun which must have been either a shotgun or a rifle. Mooney said he called 911 from his cell because he did not want to go in the house, but that the operator asked if Deming had been shot, so Mooney went into the house just far enough to see that there was "stuff" on the floor, which indicated to him that his grandfather was dead. Mooney described Deming as a good man who helped everyone and who had done a lot of great things for Mooney.

Vivian asked about Mooney's financial situation and Mooney admitted that it was a "hell of a strain" because he had been out of work for awhile and he had a girlfriend and her child to support. He said he recently had a garage sale where he made some money, but he had to sell a $20,000 piano for $1,500. Mooney explained that he had "no choice" because Susan was the primary money maker and when she does not approve of something, like his girlfriend, "she'll just cut me off. She will literally kick me out the door." Mooney said that Susan wanted to rent out the Chico house and that he did not know what he was going to do then. Brandy did not get support from her family because Mooney forced her to cut ties with them when she moved into the Chico house. Mooney also said that he recently spent $8,000 on a ring for Brandy and asked the detective not to tell Susan about that. If Susan found out about Brandy she would not approve and she would kick them out of the house.[9]

[9] Mooney told Vivian about Brandy's pregnancy and that they had talked about using Deming's name for the baby's middle name. Mooney was adamant that Vivian not tell Susan about the baby. He said he loved and also really liked both Deming and

Vivian went over Mooney's story and questioned some of the details. Mooney had answers for every question. For example, when Vivian pointed out that he had looked in the van and that the bed was not made up for sleep, Mooney responded that he was not planning to sleep, just to nap until Susan returned home and that she would have made the bed for him. At another point, Vivian asked whether Mooney remembered that someone dabbed his hands while he was sitting in the patrol car and if he knew what that was. Mooney said he knew from watching CSI that they were testing for GSR which means gunshot residue and then said "That's why—oh, shit, um, I forgot that." When Vivian asked what he forgot, Mooney said that he has been trying to teach Brandy to shoot and that they "shot a little before [he] came down." Mooney said they had used his .22 in Chico that morning and that he would "guarantee" that the GSR test would be "positive." Vivian said that officers were on the way to Chico to talk with Brandy and asked if there was any reason why Brandy would lie. Mooney said she might because the two of them had been arguing because Mooney wanted Brandy to change her baby's name to a name that Mooney liked.

Vivian asked if the present date, May 21, was significant to anyone in the family. Mooney said he did not think so. Vivian pointed out that it was Deming's 78th birthday. Mooney said he did not realize that, that the family did not celebrate Deming's birthday and that he had a full life. Regarding Deming's health, Mooney said he had diabetes and "a number of other things," that he could not work outside much anymore, and that being old and sick made him feel trapped.

Returning to the account of the home invasion, Mooney said that he was sleeping naked in the van when the men arrived. Vivian pointed out it was very cold and that the bed was not made up, but Mooney insisted that he liked to be cold when he slept and said he was curled up with the dog. Vivian also questioned how Mooney could comfortably have fit on the bed with all the stuff in there and how he was able to get out of that small

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Patrick, and that he also loved Susan, but he did not like her. She controlled the money, she was opinionated and she shot down all of his ideas.

space without even knocking over the paper towels. Mooney acknowledged it sounded "weird" but stuck with his story. Vivian asked again if there was any reason Brandy would say they did not go shooting, and Mooney suggested that she might think shooting was illegal and not want to get in trouble.

Returning to the subject of finances, Mooney said that Patrick gave him money but other than that he was "broke." He made around $3,000 at the garage sale but that "ran out fast." He would have to tell his parents about Brandy but he thought that other family members would help him out.

Part 3: ***Mooney and Vivian Consider Motive and Evidence***

Vivian asked why two people would speed into his grandfather's house, sneak in the back and "blow his brains out." Mooney said he did not know. Vivian asked how the shooter got behind Deming's chair, whether Mooney thought he had jumped over the bed or stood on top of it. Mooney said he assumed they jumped over the bed and probably left the same way. Vivian asked why someone would execute Deming. Mooney said that he initially thought it was a robbery, but he agreed with Vivian that the circumstances did not fit and said that he no longer believed Deming was killed during a robbery. Then the following exchange occurred:

"[Vivian]: Well that's why I need your help. And I appreciate your-your intelligence and your honesty.

"[Mooney]: You want me to try to figure it out?

"[Vivian]: Yeah.

"[Mooney]: Because-because I know it—I know—I know him better than you?

"[Vivian]: You do.

"[Mooney]: Do you want—you want . . .

"[Vivian]: You know the lay of the land; you know the house.

"[Mooney]: You want me to try to figure out what happened?

"[Vivian]: Yeah, I'd like you to figure out what happened. Help me out.

"[Mooney]: Well, I need your expertise.

"[Vivian]: Well, let's work on it. Let's work on it together.

"[Mooney]: Well . . .

"[Vivian]: You asked me . . .

"[Mooney]: In similar cases like this . . .

"[Vivian]: Mm-hm.

"[Mooney]: . . . if there ever have been any.

"[Vivian]: Mm-hm, there have been.

"[Mooney]: What was the outcome?"

Vivian described a case involving an 81-year-old man who used to be a tradesman and who was the "salt of the earth." He had grandchildren who he always helped, and he had made a decent living working with his hands but, as he got older, his quality of life diminished and, when he was alone he became very sad. One day, while the man was lying on his couch, a relative shot him, not out of hate but out of love, and it was not shocking "because at the end of the day, they knew that their grandfather had a good life—had a full life—and if he were—were to die, he'd want to die fast and painlessly."

Mooney said he had seen shows like that and that the scenario was "[v]ery similar" to his grandfather, but that he did not think that Deming knew the guys who shot him. Mooney suggested it may have been a gang initiation and asked if Vivian had a case like that. Vivian said the odds of that happening were very low. Vivian then proceeded to repeat Mooney's story back to him detail by detail, sometimes pointing out discrepancies or weaknesses. Vivian also made statements about the progress of the investigation, telling Mooney that the GSR test had come back positive and that Brandy had denied that she went shooting with Mooney on the morning of May 20. Nevertheless, Mooney confirmed the details of his story, although acknowledging that it sounded "weird." He asked, "You think I killed him?" Vivian responded that he never said that, to which Mooney replied, "I'm not stupid."

Mooney insisted he did not kill Deming. Vivian pointed out that desperate people do desperate things but Mooney said he was not desperate, not even financially, because he had been in spots like this before and his family always helped him out. He said that this "situation" only hurt him because he was planning to come and stay with his

grandfather and now he would no longer be able to do that. Mooney asked if there was some way to prove he was being truthful, if there was some piece of evidence. Vivian suggested a polygraph but Mooney responded that he watched a lot of television and that he did not believe in polygraphs because they were not scientific.

Vivian said he was going to take a break to use the bathroom and asked if Mooney wanted anything. Mooney said no and asked if he was under arrest. Vivian said that he was not. While Vivian was out of the room, Mooney complained out loud about his situation. He said he was going to "go to the fucking news" to complain that a "fucking Boy Scout" was being investigated for killing his own grandfather; he said that he had seen Myth Busters and polygraphs were not 100 percent tested; and he said that he was "getting really close to asking for a fucking lawyer here." He also said: "Oh, my back. Am I under arrest? Then can I go? How long have I been in here?" These statements were all made while Mooney was alone in the room.

Vivian returned with sodas for both of them and said he wanted to explore Mooney's idea of a gang shooting. He asked Mooney to describe the car and then walked through the story again, this time having Mooney draw a diagram. At one point, someone brought a videotape into the room. At another point, Vivian asked whether Mooney would be willing to get hypnotized. Mooney was skeptical, asked several questions and said he would like to do some research before agreeing to that. Later, after Mooney described the assailants' car and how he watched them drive away, Vivian said that the videotape was from "Bonneau's down on the corner," that one camera pointed right down to the freeway, and that no car fitting the description that Mooney provided had passed by that camera. Mooney said that was impossible. He asked to watch the video and Vivian said Mooney could take it home to watch later. Mooney speculated that there must be some other way off the road, insisted he was not lying.

Vivian said "I guess it rides on [Brandy]," but then pointed out that Brandy had no recollection of Mooney firing a gun on May 20. Mooney said he had already explained that and continued to focus on the videotape, suggesting there may have been a malfunction. When Vivian rejected that idea, Mooney developed a theory that people

associated with the gas station were behind the shooting. He said that his grandfather bought his cars there and maybe someone wanted one back. He said that the videotape was actually useful evidence for him because it gave him a new theory, and he asked Vivian if he knew whether any of the guys who worked at the gas station had a shotgun.

Mooney insisted that he would not benefit from Deming's death. When asked if Susan would inherit property from Deming, Mooney responded that he was not in her will or in Patrick's will. He said Susan was probably going to ex-communicate him once she found out about Brandy. Mooney insisted that having Deming gone did nothing for him and that he did not do it. Vivian said that a person who didn't do it would be willing to take a polygraph or do hypnosis. Mooney said he did not trust those tests, he did not know the science behind them and then said: "I can't make blind decisions. Not when all the evidence seems to be pointing at me." Vivian suggested that the CSI unit has a "molecule" test they could do on clothes which could show that whoever wore the clothes was in a particular room. Mooney guaranteed there was no blood on his clothes and that it was fine with him if they tested his clothes.

After going over more discrepancies, Mooney asked, "What's your gut telling you?" Vivian responded that his gut was saying that he was talking to a "very desperate young man," who had a lot on his plate. Mooney responded that "There's no motive. Motive is the word. I don't have one." Mooney said that the "scientists" would come up with a test that shows he did not do it, like the molecule test Vivian mentioned earlier. He asked how long it would take to do that test and how long he had been in the interview room. Vivian responded that Mooney had been there for five and half or six hours. Mooney said that was the longest time he had ever been anywhere. Vivian said that was not a long time, that this was part of the process, and that if Mooney was innocent, there was no problem. Mooney responded that he was not worried because the molecule test would come back negative, which would prove it was not him. So, Mooney said, "I'll wait." Mooney said that he was "a little worried, but not too worried." Vivian asked what Mooney was worried about and he said "Insanity," and then asked

how long it would take to do the molecule test. Vivian took another break to go and check.[10]

When Vivian returned he said that the person who had done the GSR test promised to call by 8:30, so it would only be another 40 minutes. Mooney said "okay." After stringing together several of the questionable details in Mooney's story, Vivian said that the dog was being tested for "blood spatter." Mooney said he let the dog out of the camper when he called 911 and that she could have gone back in the house and got blood on her feet. Vivian said that a neighbor had reported that he heard the gunshot and that he ran outside and did not see a car. Mooney responded that the neighbor was old and probably moved slowly and that the intruders left in a hurry.

Part 4: *The Accident Scenario*

Vivian said he was just looking for "facts" to show that Mooney did not do this. He said that he could see somebody going in the house and into that confined space and he could see "accident written all over that. . . . a total accident." He suggested that somebody was trying to get across the bed behind Deming's chair and that they slipped. Mooney said that he had not considered that scenario because he was looking at "intent," and why would these guys go in there and then try to cross the bed and accidentally shoot Deming. Vivian replied by asking why intruders would intentionally shoot an old man everyone thought was a "saint," especially when Mooney was right outside in the camper. Mooney admitted that the circumstances looked bad, but suggested he was being framed. He said that everything was "circumstantial," but admitted that when you put it all together it looked really bad. Ultimately, he said that he just wanted to wait for the results of the test.

Vivian went back over the stresses that Mooney was facing. Mooney said that his family always helped him out, always bailed him out in the past. Vivian said there was

[10] While Vivian was out of the room, Mooney made several statements out loud. At one point he admitted that he had made "a mistake." He also muttered something about clothes being in the house when he was shot. A while later he complained about being held at the station and said "How long can you do this."

another "fact," and Mooney said he wanted to hear it all. Vivian gave a summary, including that the neighbor "Larry" was an eye witness who said there was no car. Mooney said that Larry was too old to be a reliable witness. Then the following exchange occurred:

"[Vivian]: Well, don't judge a book by its cover. All it takes is 12 people sitting in a jury box to believe [Larry] versus [Mooney]. And it ain't just one piece of the puzzle—it's the totality of it. It's all of them put together. Now if an accident occurred, an accident occurred. Okay. That I can totally understand. Absolutely 100% I could buy into that, and then you buy into a future with (Brandy) and your kids. That is totally believable. No doubt, 100%. That's believable. And that's what I think occurred. That's what my boss thinks occurred. There's people out there going, 'This isn't deliberate. This is an accident.' That's believable. And things happen. It's how you handle it when they happen."

"[Mooney]: Even if that were true . . .

"[Vivian]: Mm-hm.

"[Mooney]: . . . it would still be manslaughter—or something. Someone dies, even if it's an accident.

"[Vivian]: Yes.

"[Mooney]: You're still guilty of something, and I know that stupid ain't in the rule book.

"[Vivian]: Stupid is in the rule book. The punishment for stupid is about 13 months, tops. Tops.

"[Mooney]: It's still a criminal record.

"[Vivian]: Who cares?

"[Mooney]: I do. I don't have one.

"[Vivian]: Okay. Stupid means freedom in future. Lying and getting caught and nailed down to a version of events in your story—is costly. That's also stupid. But at the end of the day, stupid and stupid, accident, accident, accident, and lie, lie, lie—the weight of that's a lot heavier at the end of the day. Future—minimal future. Understanding,

compassion, empathy from everybody involved, including the judge, including us—we understand. Understand an accident.

"[Mooney]: My family wouldn't.

"[Vivian]: It's not about your family. It's about you. It's about you.

"[Mooney]: My family takes care of me."

Vivian urged Mooney to think about himself instead of his family, about his freedom and his kids. When Mooney worried that he would never be able to become a police officer and that many opportunities would be closed to him, Vivian tried to get him to focus on Brandy and on fatherhood. He told Mooney not to "overthink" things and acknowledged that Mooney was under a lot of stress and scared, but said that "at the end of the day, it's an accident, and that can be dealt with."

Mooney accused the detective of changing his "strategy" and of "hinting at a motive," which Vivian denied. Vivian said that he thought there was an accident and that he did not believe that Mooney was capable of murder. Mooney said a lawyer could "build a case in the opposite direction." Vivian said he was not a lawyer and that only Mooney knew the truth. Vivian saw an accident and did not believe that Mooney had the intent to do that to his grandfather. Mooney responded: "Then where did I get a shotgun?" Vivian said he did not know, but that he did not think that Mooney "intentionally meant to do this." Vivian repeated that if Mooney kept doing what he was doing, then he would reach a point where he would not be around for his children. Mooney had already made mistakes but it was still early in the case and Vivian urged him not to make a "lifelong mistake." He repeated that "[w]e can deal with an accident," said that everyone in the department had treated Mooney with dignity and respect and that they would "look at the man you are." Then the following exchange occurred:

"[Mooney]: That's fine.

"[Vivian]: But at the end of the day, it's an accident.

"[Mooney]: It's only half an accident.

"[Vivian]: But it's an accident.

"[Mooney]: All right.

"[Vivian]: Okay. Even if it's a little accident—a tenth is still an accident.

"[Mooney]: You know . . .

"[Vivian]: But we can deal with that. We can deal with that. We can deal with all of it. We can deal with [Susan], we can deal with [Brandy], we can deal with your dad.

"[Mooney]: You're putting me under so much stress. Look . . .

"[Vivian]: We can deal with this.

"[Mooney]: It was an accident.

"[Vivian]: I believe it.

"[Mooney]: But it's more complicated than that."

After this exchange, Mooney told a new version of the events of the prior night.

Part 5: *Mooney's Second Version of Events Based on Accident*

Mooney's new story was that Deming asked Mooney to shoot him so that the family could get his insurance money, that Mooney refused that request and tried to take the gun outside, but that the gun accidentally went off when Deming tried to reach for something on the table. Backtracking a bit, Mooney explained that Deming had called him earlier in the day and told him to bring some bullets for the shotgun so they could go shooting together. According to Mooney, Deming said they would keep it a secret from Susan because he knew that she did not like guns and that she had made Mooney sell his .22. Deming had to tell Mooney what type of bullets to buy because he was not familiar with shotguns.

Mooney said that, after Susan left the house, they started watching the movie and "[h]alf an hour in the movie, he busts out the-the shotgun." Mooney thought they were going to go shooting, but then Deming called him over and said "'I love you, and I want you to do this for me,'" and then handed Mooney the gun and just closed his eyes. Mooney said no, and then Deming "got all freaked out." He was old and could hardly get out of his chair. Mooney tried to go outside to toss the gun, but saw Deming going for something and thought it was another weapon and that Deming was going to shoot himself. So he jumped across the bed, trying to stop Deming, and the "fucking thing

goes off." At that point, Mooney "freaked out." He ran outside, "swapped the clothes," and ran out back and threw the shotgun and the box of shells on top of one of the trailers that was behind the house. Then he ran back and dialed 911 and made a false report. Mooney said "who would have guessed" that there were cameras that covered the intersection and he complained that "I've never done anything. It isn't fair that I'm in this situation."

After further discussion, Vivian asked if Mooney would be willing to walk through how this happened and Mooney said that he would and asked if that would help. Vivian said it would help him understand how this accident occurred. Vivian then said he was going to leave and be right back and asked again if Mooney wanted anything.

While Mooney was alone in the room, he began to sob and complain about going to "fuckin' jail" for a "fuckin' year." He told himself to "let it all out," and also said "he's probably just lying to me. He doesn't fuckin' care if it was an accident. I don't even know." When Vivian returned, Mooney said he forgot to tell him that he wiped down the gun before he threw it on top of the trailer to remove his fingerprints, pointing out again that he watched CSI. Mooney said he wanted to make sure that Vivian had "every detail." Vivian left again and when he returned he urged Mooney to eat something while he made arrangements to go out to the Sonoma house. After discussing some logistics, the following exchange occurred:

"[Mooney]: What . . . if—if—, if you, if you agreed with what happened as I understand I just told it . . .

"[Vivian]: Yes.

"[Mooney]: What am I looking at here?

"[Vivian]: You know, I can't make you any promises. I can't make . . .

"[Mooney]: No, I don't want a promise.

"[Vivian]: I can't make any deals.

"[Mooney]: (Clearing throat) I want a hypothesis, I want a theory.

"[Vivian]: If what you say is true, it's an accident. An accident is manslaughter, okay?

"[Mooney]: (sigh)

"[Vivian]: There's a big difference from manslaughter and murder, okay. I'm just giving you the definitions. That's why I need clarity, okay. Now, don't start over thinking this again either.

"[Mooney]: I'm not."

3. *Analysis*

After considering the totality of the circumstances in this case, we conclude that Mooney's admission to Detective Vivian that he accidentally shot and killed Deming was voluntary. At the outset of the May 21 interview, Mooney unequivocally waived his *Miranda* rights. Throughout the interview, Mooney consistently expressed a desire to talk to Vivian and to cooperate with the investigation. Before Mooney made his admission, he agreed to work with Vivian to try to figure out why somebody shot Deming. Mooney also asked Vivian to share his expertise and made the suggestion that Vivian describe other cases that involved potentially similar circumstances. As Vivian navigated back and forth between these two lines of discussion, one focusing on Mooney's false home invasion report and the other on alternate scenarios, Mooney was a willing and active participant. When, during the course of that discussion, Mooney disclosed that he accidentally shot Deming, it does not appear that his " ' "will was overborne," ' " (see *Holloway, supra,* 33 Cal.4th at p. 114) but, rather, that he made a calculated decision to change his story.

As noted at the outset of our discussion, Mooney's primary contention is that his admission that he accidentally shot Deming was induced by Vivian's promise of leniency. He construes Vivian's remarks during part 4 of the interview as a promise that, if Mooney would admit that he accidentally shot Deming, then he would be charged with involuntary manslaughter and would not have to go to prison for more than 13 months.

There is a "crucial distinction . . . between simple police encouragement to tell the truth and the promise of some benefit beyond that which ordinarily results from being truthful." (*Vasila, supra,* 38 Cal.App.4th at p. 874.) As our Supreme Court has explained: "When the benefit pointed out by the police to a suspect is merely that which

flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible." (*People v. Hill* (1967) 66 Cal.2d 536, 549.)

Applying this principle here, we find that the challenged statements do not constitute an improper promise. The premise of the scenario that became the focus of part 4 of the interview was that Deming was shot during the course of an accident. This was one of many scenarios that Mooney freely discussed and openly considered. While considering that scenario with Mooney, Vivian did not make any statement or statements that could be interpreted as a promise that if Mooney admitted that he shot his grandfather, he would only be charged with manslaughter and would not have to serve more than 13 months in prison. Rather, during that exchange, Mooney expressed concern that an accidental killing was still manslaughter and that the law does not have any special "rule" for committing a "stupid" accident. By correcting that erroneous belief, and telling Mooney that the punishment for that type of crime, i.e., involuntary manslaughter, was about 13 months, Vivian did not make any promise at all. Nor did he promise any benefit in exchange for a confession by observing that lying and committing oneself to a demonstrably false story would also be "stupid," indeed more "stupid" than accidentally killing someone. In essence, Vivian told Mooney that, if an accident occurred, then continuing to maintain the obvious lie about a home invasion was not a wise course of action. In other words, Vivian did not promise any "benefit beyond that which ordinarily results from being truthful." (*Vasila*, *supra*, 38 Cal.App.4th at p. 874.)

Mooney's notion that Vivian's comments should be interpreted as an implied promise of leniency rests in large part on the timing of his admission that he shot Deming. Mooney contends that he stood by his original story and resisted Vivian's aggressive efforts to extract a confession from him for many hours, but then he suddenly

changed position and admitted that he shot Deming almost immediately after Vivian made the challenged statements during part 4 of the interview.

To facilitate our discussion, we have divided the May 21 interview into separate parts. However, part 4 of the interview clearly was not a distinct or isolated interaction. Rather, it was the culmination of lengthy discussions, during which the participants explored the weaknesses of Mooney's first version of the events and also "worked together" to attempt to find a plausible explanation for what happened. Thus, when Vivian finally expressed his personal preference for the accident scenario, Mooney too saw the benefits of adopting that scenario as his own. In other words, Mooney admitted he shot Deming, albeit by accident, at the point in the interview when he became convinced that he could actually prove the shooting was an accident. It was this reasoned decision, not some promise of leniency, which led Mooney to make his admission.

This interview is comparable to the interview that was analyzed by our Supreme Court in *Holloway, supra*, 33 Cal.4th 96, an automatic appeal from a judgment imposing the death penalty. There the defendant argued that admissions he made to police were involuntary because they were induced by an improper threat or promise. (*Id*. at p. 112.) The *Holloway* court found that detectives did not "cross the line from proper exhortations to tell the truth into impermissible threats of punishment or promises of leniency" by pointing out that " 'we're talking about a death penalty case here,' " when such an outcome was an obvious possibility in light of the facts of the crime. (*Id*. at p. 115.) Furthermore, suggestions that the killings could have been accidental or the result of a fit of rage accompanied by a representation that mitigating circumstances " 'could make[] a lot of difference,' " fell "far short of being promises of lenient treatment in exchange for cooperation." (*Id*. at p. 116.)

In reaching these conclusions, the *Holloway* court was cognizant of the overall tenor of the interview in which it appeared that the " 'defendant was attempting to use the interview as much as the officers.' " (*Holloway, supra*, 33 Cal.4th at p. 116.) Ultimately, the court concluded that the interview was "better characterized as a 'dialogue or debate between suspect and police in which the police commented on the realities of [his]

position and the courses of conduct open to [him]' [citation] than as a coercive interrogation." (*Ibid*.) We reach similar conclusions here: The distinctions that Vivian drew between an accidental shooting and murder were statements of the obvious, under the circumstances. Furthermore, when viewed in its totality, this interview is better described as a dialogue or debate between Mooney and Vivian than as a coercive interrogation.

Mooney also contends that when Vivian's remarks are considered along with other deceptions that Vivian employed, they amount to an implied promise that Mooney would only be charged with involuntary manslaughter if he confessed to an accidental killing. Deception alone does not render a confession involuntary unless it is of a type reasonably likely to procure an untrue statement. (*People v. Cahill* (1994) 22 Cal.App.4th 296, 315 (*Cahill*).) However, evidence of deception can be probative when, for example, an interrogator used deception to reinforce an implied promise or to make such a promise more plausible. (*Ibid*.; *People v. Hogan* (1982) 31 Cal.3d 815, 840-841, overruled on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

In the present case, Mooney contends that Vivian lied to him during the May 21 interview by stating that (1) the gunshot test came out positive, (2) Brandy denied that she went shooting with Mooney, (3) the surveillance tapes from the gas station showed that no car had passed down the road, (4) there was blood on the dog; (5) Larry Anderson heard the gunshot and ran outside but did not see a car. Mooney has failed to support the factual predicate of this theory (i.e., that these statements were false) with citations to actual evidence in the record; he relies instead on an argument in a defense brief filed in the lower court. Furthermore, with regard to some of these examples, the alleged deception was only that Vivian erroneously claimed that facts or evidence had already been confirmed, but not that the underlying facts or evidence were ultimately false. In any event, even if Vivian's statements were false, they do not alter our conclusion because there is no causal nexus between these representations and the promise of leniency that Mooney asks us to imply.

Cahill, supra, 22 Cal.App.4th 296, illustrates our point. In that case, two detectives interrogated defendant, who was a suspect in an investigation of a rape and murder committed during the course of a robbery. Initially, the defendant admitted his role in several robberies, but would only discuss the victim's case in hypothetical terms. However, the officers told the defendant their evidence established that he was in the victim's house and that if he did not disclose any mitigating factors he would be charged with premeditated murder. Then the lead interrogator gave the defendant a materially deceptive synopsis of the law of murder, omitting any reference to the felony murder rule, and also repeatedly suggested that defendant could avoid a first degree murder charge if he admitted that the killing was not premeditated. Eventually, the defendant admitted he participated in an armed robbery of the victim but claimed that his friend raped and shot the victim.

The *Cahill* defendant was convicted of first degree murder and, on appeal, challenged the voluntariness of his confession, alleging that the officers' remarks amounted to an implied promise of leniency. The court agreed, finding that "the basis" of the lead detective's efforts to extract a confession from the defendant was "his representation that defendant could avoid a charge of murder in the first degree if the killing were not premeditated." (*Cahill, supra*, 22 Cal.App.4th at p. 314.) According to the court, the "thrust of [the detective's] argument to defendant was that he should tell what had occurred to dispel the implication that the murder was premeditated" and the clear implication of his remarks was that the defendant would be tried for premeditated murder unless he admitted he was in the victim's house and denied that he premeditated the killing. This threat, the court found, was also an implied promise that if defendant admitted his role in the killing but had not premeditated, he might avoid a conviction for first degree murder. (*Id*. at p. 314.)

The *Cahill* court also found that other factors "impelled" the conclusion that the "interrogation tactics amounted to a false promise." (*Cahill, supra*, 22 Cal.App.4th at p. 315.) Specifically, the detective used "collateral deception" to make his implied promise of leniency "more plausible." (*Ibid*.) For example, the detective misled the defendant

about the seriousness of his situation by suggesting that this was not a death penalty case because there was no premeditation. More important, the detective drove home the distinction between premeditated and unpremeditated killings by offering a materially deceptive account of the law of murder from which he omitted any mention of the felony murder rule. The court found that this deceptive omission was intentional and that it made the implied promise that the defendant could avoid a first degree murder charge more plausible. Furthermore, the officers enhanced both "the promissory character" of their representations and "the implication of leniency in return for a statement" by telling the defendant that the lead detective would likely testify at trial and that he would be asked to share his impressions of defendant, including whether he was sorry for what he had done. (*Ibid.*) They implied that a positive report could not be given if the defendant refused to talk to them about the case. The officers also suggested that expressions of remorse would be an important factor to the judge and jury and that if defendant did not say anything the only logical conclusion was that he had no remorse. (*Ibid.*)

Cahill, like other cases of that ilk, is distinguishable from this case in crucial respects. Here, the challenged representations—that the law does distinguish between an accidental killing and a murder, and that the penalty for the former is 13 months—were neither deceptive on their face nor the "basis" for attempting to extract a confession. They were off-hand remarks, made in response to Mooney's own comments during one of many lines of inquiry that Vivian and Mooney pursued together. Nor were they couched in an express or implied threat; Vivian never suggested that Mooney would be charged with murder (or any other crime for that matter) unless he admitted to accidentally shooting Deming. More to the present point, to the extent that Vivian lied by claiming to have evidence that was not yet gathered or conclusive, those lies were not expressly nor implicitly tethered to Vivian's representations about the legal distinction between an accidental killing and a murder. Thus, Vivian did not use collateral deception to either convey or solidify an implied promise of leniency.

Shifting gears, Mooney also contends that his personal characteristics are evidence that his will was overborne by Vivian's interrogation tactics. There is evidence that

Mooney was immature, self-important and perhaps even narcissistic. Though Vivian took advantage of those personal attributes, the video recording of Mooney's statement and the transcripts of his telephone calls with his parents consistently portray him as a calculating individual whose every move was dictated by his own strong will.

Mooney also intimates that "the videotape and transcript display [him] as raving bizarrely to himself—and worrying aloud about his sanity—when no one else was in the room." This contention finds support in the transcript of the May 21 interview *only* if it is reviewed in isolation; the videotape of that interview clearly shows that the transcript is misleading. Isolated statements that Mooney made during long periods when he was left alone in the interview room are reported in the transcript as though they were a single uninterrupted dialogue. In fact, however, the video account of the interview establishes that the majority of the statements that were lumped together in the transcript were not connected to each other at all, but were made intermittently over a much longer period while Mooney waited alone in the interview room. Some of the statements were likely thoughts about the incident that Mooney said out loud, while others were obviously contemporaneous observations about Mooney's appearance or the environment in the interview room. Indeed, our independent review of the DVD's establishes that Mooney never ranted and that his comments made logical sense in the context in which they were uttered.

Mooney also contends that his will to resist making an involuntary admission was overborne because he was subjected to harsh treatment and conditions during the interrogation. In this regard, Mooney contends that (1) he was "held" in a patrol car for several hours, (2) "he was shirtless and shivering" for "hours," (3) he was denied access to a bathroom "for a prolonged period," and (4) he was "given only some stale chips to eat." These assertions are inconsistent with the evidence before us.

The record establishes that when officers arrived at the Sonoma house, Mooney was shirtless and wore only shorts and sandals, despite the extremely cold weather. Under those circumstances, he accepted an offer to wait in the patrol car. Furthermore, when Mooney first entered the interview room at the police station, he was provided with

a cup of water. The officer then went to find a shirt for Mooney and, upon his return, offered the use of a bathroom. Offers to refill Mooney's water and to let him use the bathroom were made several times during the period that Mooney spent at the police station. During his time in the interview room, Mooney was also provided with a bag of chips, a soda and a breakfast burrito. When he complained that the first bag of chips that he received was stale, an officer went to the vending machine and retrieved another bag of chips for Mooney. Finally, and most significantly, throughout the period that Mooney was at the police station, he had an excellent rapport with all of the officers who had contact with him.

Mooney did spend considerable time in the interview room, all told more than nine hours according to the video timer. Although Mooney periodically commented about the passage of time, he never asked to leave or told anyone that he was suffering. And, when people apologized for the long wait, Mooney consistently demurred. The DVD's show that, during most of the time that Mooney was alone in the room, he sat in quiet contemplation or rested his head against the wall or table and napped. Furthermore, after the first and longest waiting period, when Vivian arrived and commenced the interview, Mooney was unequivocal about his desire to waive his *Miranda* rights, to give an account of the events and then to discuss not just that account but various scenarios that might explain why somebody would shoot Deming.

For all of these reasons, we conclude that the totality of the circumstances pertaining to the May 21 interview establish that Mooney's admission that he shot Deming was voluntary. Therefore, evidence of that admission and the story Mooney told to support his claim of an accidental shooting was properly admitted into evidence at trial.

B. ***Duty to Instruct on Lesser Included Offense***

Mooney contends that his murder conviction must be reversed because the trial court failed to instruct the jury on the "unlawful act" theory of involuntary manslaughter.

When there is substantial evidence to support an instruction on a lesser included offense, the trial court must give the instruction regardless of the theories of the case

proffered by the parties. (*People v. Breverman* (1998) 19 Cal.4th 142, 159-162 (*Breverman*).)[11] Involuntary manslaughter is defined by statute as the unlawful killing of a human being without malice "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) Thus, section 192 establishes two distinct theories of involuntary manslaughter: (1) the unlawful act theory and (2) the criminal negligence theory. (*Ibid*.) When involuntary manslaughter is a lesser included offense of the charged offense, the trial court has a sua sponte duty to instruct on both theories of involuntary manslaughter if both are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61.)

In the present case, there is no dispute that involuntary manslaughter was a lesser included offense of the murder charged in count one of the information. Accordingly, the trial court gave an involuntary manslaughter instruction patterned on CALCRIM No. 580 which addressed the criminal negligence theory of involuntary manslaughter. On appeal, Mooney contends this instruction was inadequate because it did not apprise the jury of the unlawful act theory of involuntary manslaughter. Specifically, Mooney contends that the jury should have been instructed on the unlawful act theory because there was "ample" evidence that (1) he killed Deming without malice, and (2) the shooting was a "direct result" of the unlawful act of possession of a stolen firearm.

The first prong of Mooney's analysis, though lengthy, is irrelevant since there has never been any dispute that there is evidence from which the jury could have (but did not) find that Mooney lacked malice. The probative question is whether there was evidence of a predicate criminal act to support the unlawful act theory and, unfortunately, the second prong of Mooney's argument fails to squarely address that question. Instead,

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[11] "[T]he sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. Hence, substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself." (*Breverman, supra*, 19 Cal.4th at pp. 162-163.)

Mooney contends that Deming's shooting was a direct result of Mooney's unlawful possession of the shotgun. The term "direct result" is ambiguous and Mooney does not provide any authority for employing it here. Section 192, subdivision (b), describes involuntary manslaughter as the unlawful killing of a human being without malice "*in the commission* of an unlawful act." (Emphasis added.) Furthermore, the case law establishes that there must be evidence of a causal relationship between the predicate unlawful act and the victim's death in order for this theory to apply at all. (See *People v. Penny* (1955) 44 Cal.2d 861, 881; *People v. Nelson* (1960) 185 Cal.App.2d 578, 580-583.) Here, there is no evidence that Mooney's possession of a stolen gun caused Deming's death.

Mooney directs our attention to *Lee, supra*, 20 Cal.4th 47. In that case, the defendant was charged with murdering his wife. The evidence showed that defendant had been drinking heavily when he engaged his wife in a physical altercation. At one point, defendant left the room and when he returned a couple of minutes later with a loaded gun, "the couple continued to push each other with the gun between them." At that point, the couple's daughter, who had witnessed these events, went to her room where she heard a gunshot. The victim died instantly from a contact or near contact gunshot to her head just above her eye. (*Id.* at p. 53.) The trial court instructed the jury on the criminal negligence theory of involuntary manslaughter and also gave a pinpoint instruction regarding the effect of voluntary intoxication. (*Id.* at p. 54.) However, the *Lee* court found that the jury should also have been instructed on the unlawful act theory of involuntary manslaughter. The court reasoned that there was evidence that when the defendant used his gun during the quarrel with his wife he was "committing the misdemeanor offense of 'brandishing' a weapon." (*Id.* at p. 61.) Thus a jury could have found that the defendant killed without malice during the commission of an unlawful act.

Mooney contends that the present case is "just like" *Lee* because there was ample evidence that he acted without malice and that "the shooting was a direct result of an unlawful act—in this case, Sean's unlawful possession of a stolen firearm." However, *Lee* does not hold or intimate in any way that Mooney's "direct result" language can

substitute for the statutory requirement that the killing must occur "in the commission" of the predicate unlawful act. In *Lee*, there was evidence that the defendant was committing the offense of brandishing a firearm when he accidentally shot and killed his wife. In the present case, there is no evidence from which the jury could have found that Mooney was in the process of committing some separate and independently unlawful act when he accidentally shot and killed Deming.

Mooney complains that the failure to instruct on an unlawful act theory essentially precluded the jury from considering whether Mooney was guilty of involuntary manslaughter. He reasons that, by returning a guilty verdict on the count three charge of possession of a stolen shotgun, the jury necessarily found that Mooney committed an unlawful act and, once that finding was made, the instructions required the jury to reject the involuntary manslaughter option because there was no instruction permitting it to consider the unlawful act theory of that lesser included offense.

This illogical argument is simply not consistent with the instructions that this jury received. Pursuant to the count three charge, the jury convicted Mooney of "receiving stolen property" in violation of section 496, subdivision (a), based on instructions that it had to find that the defendant (1) bought or received property that had been stolen, (2) when he knew that the property had been stolen, and (3) that he actually knew of the presence of the property. Returning a guilty verdict on this charge did not expressly nor implicitly preclude the jury from separately considering whether Mooney was guilty of involuntary manslaughter. Indeed, Mooney does not identify any single instruction which could have been misconstrued as connecting these two distinct inquiries.

Mooney repeatedly contends that the prosecutor told the jury they could not convict Mooney of the lesser involuntary manslaughter charge *because* that offense required proof of a lawful act committed with criminal negligence and Mooney's gun possession was an unlawful act. However, this contention is not supported by the record citations that Mooney provides. We have found no indication that the prosecutor or anyone else ever even suggested that Mooney could not be found guilty of involuntary manslaughter because possession of the shotgun was unlawful.

In any event, there was no substantial evidence to support a finding of involuntary manslaughter based on an unlawful act theory. Therefore, we reject Mooney's contention that the trial court had a sua sponte duty to instruct the jury on that theory.

C. *The Special Circumstance Instruction*

1. *Issue Presented*

The jury found true a special circumstance allegation that the murder was committed for financial gain under section 190.2, subdivision (a)(1) (section 190.2(a)(1)), which provides that a conviction for first degree murder will result in a penalty of death or life without the possibility of parole when "[t]he murder was intentional and carried out for financial gain."

Mooney contends that this special circumstance finding must be reversed because an instructional error deprived him of his constitutional right to have the jury determine all of the elements of the special circumstance allegation, based on proof beyond a reasonable doubt. In assessing this claim of error, we ask whether it is reasonably likely that the jury " ' "applied the challenged instruction[s] in a way" that violates the Constitution.' " (*People v. Raley* (1992) 2 Cal.4th 870, 901; *People v. Smithey* (1999) 20 Cal.4th 936, 981.)

2. *Background*

In the present case, the trial court gave the jury preliminary instructions at the commencement of the trial which included an instruction regarding the presumption of innocence and the prosecutor's burden of proof. When the court instructed the jury after all the evidence was presented, it gave another instruction reminding the jury of the presumption of innocence and the prosecutor's burden of proving its case beyond a reasonable doubt.

The jury then heard general law instructions, which included instructions defining general criminal intent and specific intent and advising the jury about the specific type of intent that the prosecutor had to prove with respect to the charged crimes and special allegations. The jury was told, among other things, that the special circumstance allegation of murder for financial gain required evidence of specific intent.

Then, after instructing the jury regarding the murder charge, lesser included offenses and the allegations pertaining to that charge, the court told the jury that "[i]f you find the defendant guilty of first degree murder, you must also decide whether the People have proved that the special circumstance is true." The court again advised the jury of the people's burden of proving the special circumstance "beyond a reasonable doubt," and reminded them what that meant. It also gave instructions on the role of circumstantial evidence and how such evidence could not be used to circumvent or lower the prosecutor's burden of proving not only the act charged in the special circumstance allegation, but also that the defendant did the act with the requisite intent or mental state.

After laying this foundation, the court instructed the jury regarding the elements of the special circumstance allegation with CALCRIM No. 720, as follows: "The defendant is charged with the special circumstance of murder for financial gain in violation of Penal Code section 190.2(a)(1). [¶] To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant intended to kill; [¶] AND [¶] 2. The killing was carried out for financial gain."

The CALCRIM instruction was supplemented with the following special instruction, which was given without objection: "The People do not have to prove that the defendant actually received financial benefit from the victim's death. It is sufficient that the defendant believed that the victim's death would result in some financial benefit. The People do not have to prove that the defendant would be the direct recipient of the anticipated financial gain. It is sufficient that the defendant committed the murder with the expectation that a third person would be the recipient of the financial gain. The financial gain need not be cash, as it may be anything else of value."

3. *Analysis*

Mooney contends that the special instruction quoted above contains an erroneous statement of the law governing the application of the section 190.2(a)(1). In *People v. Carasi* (2008) 44 Cal.4th 1263 (*Carasi*), our Supreme Court stated that this statute "applies to murders motivated by financial gain. [Citations.] However, such gain need not be the sole or main motive for the murder. [Citations.] Nor must defendant

experience any actual pecuniary benefit from the victim's death. [Citation.] ' "[T]he relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain." ' [Citation.]" (*Id.* at pp. 1308-1309.)

Borrowing language from *Carasi*, Mooney contends that the special instruction that was given in this case was deficient because it did not tell the jury they had to find that Mooney was either "motivated by financial gain" or that he killed Deming " ' "in the expectation that he [or a third party] would thereby obtain the desired financial gain." ' " (Quoting *Carasi, supra*, 44 Cal.4th at pp. 1308-1309.) According to Mooney, this flawed instruction essentially told the jury that, in order to find the special circumstance allegation true, it was "sufficient" to find that Mooney "believed that the victim's death would result in some financial benefit." Mooney underscores that such a belief clearly was not sufficient and argues that the trial judge erred by failing to also require that the prosecution prove that Mooney "intended or was motivated by such a benefit."

Mooney's piecemeal analysis of isolated phrases in the special instruction does not persuade us that it is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. " ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court not from a consideration of parts of an instruction or from a particular instruction." ' " (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Ignoring this fundamental principle, Mooney plucks select words from the special instruction and assigns a meaning to them which cannot be sustained when the instruction is read as a whole. The special instruction does not state or in any way intimate that the defendant's belief that the victim's death would result in some financial benefit is "sufficient" by itself to support a finding that the special circumstance allegation is true. Rather the word "sufficient" refers back to the prior sentence in the instruction and clarified for the jury that it did not have to find that Mooney *actually obtained* a financial benefit by killing his grandfather.

Furthermore, Mooney divorces the special instruction from its companions, thereby ignoring its function as a pinpoint instruction and creating the illusion that this instruction was used in this case as a comprehensive statement of the law pertaining to

the special circumstance of a murder committed for financial gain. In fact, as reflected above, numerous instructions were given to the jury to guide its consideration of the special circumstance allegation. Significant among them was CALCRIM No. 720, which expressly required that the jury find that the murder was intentional and that "[t]he killing was carried out for financial gain."

When read in context, the special instruction was not erroneous. Furthermore, when read as whole, the jury instructions pertaining to the special circumstance allegation of murder for financial gain were not deficient; the jury was adequately advised of the applicable law, including the elements of that charge, the need for proof of specific intent, and the prosecutor's burden of proving the allegation beyond a reasonable doubt. We thus reject Mooney's claim of instructional error.

4. *Elder Abuse*

Mooney's final contention is that substantial evidence does not support his conviction for elder abuse.

" 'The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] " '[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder.' " [Citation.]' " (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572-1573.)

"The standard of appellate review is the same when the evidence of guilt is primarily circumstantial. 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding

does not warrant a reversal of the judgment.' " ' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 668.)

Pursuant to section 368, "[a] defendant can be convicted of felony elder abuse when he or she 'knows or reasonably should know that a person is an elder . . . and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder . . . to suffer, or inflicts thereon unjustifiable physical pain or mental suffering.' [Citation.]" (*People v. Racy* (2007) 148 Cal. App.4th 1327, 1331-1332, italics omitted.)

Accordingly, the jury in this case was instructed, pursuant to CALCRIM No. 830, that in order to prove that Mooney was guilty of elder abuse, the prosecution had to prove that: "1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on Robert Deming. [¶] 2. The defendant inflicted suffering on Robert Deming or caused Robert Deming to suffer or be injured under circumstances or conditions likely to produce great bodily harm or death. [¶] 3. Robert Deming was an elder. [¶] AND [¶] 4. When the defendant acted, he knew or reasonably should have known that Robert Deming was an elder."

Mooney's sole contention with respect to this charge is that there was insufficient evidence that Deming actually experienced physical or mental pain before he died. According to Mooney, "[i]f anything, the record evidence suggests that Mr. Deming's death was unanticipated and without suffering." To support this notion, Mooney relies on photographs of Deming which, though "horrifying," show that Deming appeared to be at rest with his arms and hands in his lap. Indeed, according to Mooney, it did not appear that Deming was "aware of his impending demise or that he experienced any pain in its course."

Neither section 368 nor the CALCRIM instruction that was given in this case without objection require a subjective assessment of the degree of pain actually experienced by the victim of elder abuse. Rather, the relevant inquiry pertains to whether the defendant "inflicted" physical pain or mental suffering. Overwhelming evidence supports the finding that Mooney did just that.

Mooney does not cite a single case that supports his contention that proof that Deming "experienced pain or suffering in the course of, or as a result of, the shooting" is a "key element" of the elder abuse charge. Instead, he provides a string citation to authority from outside this jurisdiction which pertains to crimes that require proof of such elements as "torture or serious physical abuse" (*Toles v. Gibson* (10th Cir. 2001) 269 F.3d 1167, 1183), and " ' "great physical anguish" ' " or " ' "conscious physical suffering," ' " (*Hooker v. Mullin* (10th Cir. 2002) 293 F.3d 1232, 1240-1241). These cases are inapposite on their face.

Even if evidence the victim actually *experienced* pain is required to prove felony elder abuse, that evidence was present here. The damage Mooney inflicted on Deming's head and brain is substantial circumstantial evidence from which the jury could have reasonably found that Deming experience physical pain. The autopsy evidence that Deming took a breath or two before he died is additional evidence that Deming experienced both physical and mental anguish before he lost his life.

IV. DISPOSITION

The judgment is affirmed.

_____
Haerle, Acting P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.